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No. _____

In The

Supreme Court of the United States

ISMAIL HOSSAIN,

Petitioner,

v.

IMMIGRATION AND NATURALIZATION SERVICE,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Ninth Circuit's method of adjudicating asylum cases beased on past persecution – in which the court frequently decides in the first instrance whether the regulatory presumption of future persecution (which arises upon a showing of past persecution) has been rebutted – impermissibly usurps the authority of the Board of Immigration Appeals to decide factual questions that arise in deportation cases.

2. Whether a court may affirm the decision of an administrative agency on grounds not invoked by the agency.

PARTIES TO THE PROCEEDINGS

Petitioner Ismail Hossain was also the petitioner in the court of appeals, and Respondent Immigration and Naturalization Service was the respondent below.

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PETITION FOR A WRIT OF CERTIORARI

Ismail Hossain ("Mr. Hossain"), through his undersigned counsel, respectfully petitions for a writ of certiorari to review the decision of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The immigration judge's decision denying Mr. Hossain's applications for asylum and withholding of deportation to Bangladesh, and ordering him excluded and deported from the United States, App. 7-15, *infra*, is unpublished. The decision of the Board of Immigration Appeals dismissing his appeal, App. 16-36, *infra*, is unpublished. The memorandum opinion of the court of appeals denying Mr. Hossain's petition for review of the Board's decision, App. 1-6, *infra*, is also unpublished. The court of appeals' order denying his petition for rehearing, and petition for rehearing *en banc*, App. 37, *infra*, is unpublished.

JURISDICTION

The opinion of the court of appeals was filed on March 10, 1999. App. 1-6, *infra*. A petition for rehearing and rehearing *en banc* was denied on May 26, 1999. App. 37, *infra*. This Court has jurisdiction to review the court of appeals' opinion pursuant to 28 U.S.C. section 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

Section 208(b)(1) of the Immigration and Nationality Act ("INA") [8 U.S.C. § 1158(b)(1)] authorizes the Attorney General, in her discretion, to grant asylum to a "refugee." App. 38, *infra*. Section 101(a)(42)(A) of the INA [8 U.S.C. § 1101(a)(42)(A)] sets out the statutory definition of "refugee." App. 38, *infra*. 8 C.F.R. section 208.13(b)(1)(i) establishes a rebuttable presumption that a victim of past persecution has a well-founded fear of future persecution upon return to his or her country of nationality. App. 39, *infra*.

STATEMENT

This case concerns the scope of the Ninth Circuit's authority when reviewing the legal and factual conclusions of the Board of Immigration Appeals ("the Board"). Specifically, this case presents the question of whether a court of appeals may (1) usurp the Board's powers to resolve factual disputes and (2) affirm a decision of the Board on grounds not invoked by the Board itself.

Ismail Hossain is a 33 year old political activist from Bangladesh. While attending college, Mr. Hossain became enamored with the political philosophy of President H.M. Ershad, and in January 1988, he joined Ershad's Jatiyo Party. As a member, Mr. Hossain attended Jatiyo Party meetings three times a month, distributed pamphlets and leaflets, and put up Jatiyo Party posters. In addition, following a serious flood, he was appointed to distribute aid to those people most affected.

Beginning in August 1989, anti-Ershad demonstrations spread across Bangladesh. In December 1990, Ershad handed his presidential powers over to an unaffiliated caretaker. Immediately after he left office, Ershad and many other Jatiyo Party members were arrested.

In February 1991, the Bangladesh National Party ("BNP") won a parliamentary plurality and formed a new government, installing BNP members and sympathizers in positions of power. Shortly thereafter, the BNP cracked down on the activities of the Jatiyo Party.

Despite constant harassment by the BNP, the Jatiyo Party continued to organize. In February 1993, Mr. Hossain led 100 members of the Jatiyo Party in a peaceful procession to pressure the government to free Ershad and other Jatiyo Party leaders. Near the office of the BNP, the procession was stopped by a mob of 40-50 BNP activists, who ordered them to disperse.[1] When the demonstrators refused, the BNP mob attacked with pistols, hockey sticks, and bamboo rods. Although many of the demonstrators fled in fear, Mr. Hossain and several others did not. As a consequence, Mr. Hossain was severely beaten with a hockey stick on his head, shoulders, and legs, leaving him, in his words, "too hurt to move." When the

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[1] In a report contained in the administrative record, the U.S. Department of State confirms that "the government and BNP followers consistently harassed and attempted to block Jatiyo Party rallies." U.S. Dep't of State, Bureau of Democracy, Human Rights and Labor, *Bangladesh: Comments on Country Conditions and Asylum Claims*, May, 1995.

police finally arrived, they found him lying at the scene and arrested him.

Because Mr. Hossain was so badly injured, the police took him to a clinic near the jail. Then, they jailed him for approximately one month. On five or six occasions during the course of that month, the police told Mr. Hossain that he would be released only if he agreed to cease his activities for the Jatiyo Party. Recognizing this as his only option, Mr. Hossain eventually agreed. Two days later, he was released.

Mr. Hossain remained in Bangladesh for approximately four months, finally fleeing (in the face of continuing threats) in July 1993. Mr. Hossain arrived in San Francisco, California, on September 9, 1993. He was immediately detained by the Immigration and Naturalization Service and placed in exclusion proceedings. He appeared before an immigration judge on September 14, 1993, and conceded excludability. In lieu of an order of exclusion and deportation, Mr. Hossain applied for asylum and withholding of deportation to Bangladesh.[2]

To be eligible for asylum under section 208 of the Immigration and Nationality Act [8 U.S.C. § 1158], an alien must demonstrate that he or she is a "refugee," i.e. one who is unwilling or unable to return to his or her country "because of persecution or a well-founded fear of persecution on account of race, religion, nationality,

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[2] Although Mr. Hossain applied for two distinct forms of relief from deportation, *see INS v. Cardoza-Fonseca*, 480 U.S. 421 (1987), this petition generally refers to his application for asylum. The issues before this Court, though, apply equally to both of Mr. Hossain's applications.

membership in a particular social group, or political opinion." INA §§ 101(a)(42)(a) [8 U.S.C. § 1101(a)(42)(a)] and 208(a) [8 U.S.C. § 1158(a)]. App. 38, *infra*.

Because the refugee definition is written in the alternative, a victim of past persecution qualifies for a discretionary grant of asylum, even absent a well-founded fear of future persecution. Moreover, a victim of past persecution "shall be presumed also to have a well-founded fear of persecution unless a preponderance of the evidence establishes that since the time the persecution occurred conditions in the applicant's country of nationality . . . have changed to such an extent that the applicant no longer has a well-founded fear of being persecuted if he or she were to return." 8 C.F.R. § 208.13(b)(1)(i). App. 39, *infra*.[3]

Following a hearing on November 22, 1996, the immigration judge rendered an oral decision denying Mr. Hossain's applications for asylum and withholding of deportation. The immigration judge had "no[ ] doubt" that Mr. Hossain's testimony was "credible" and that it "should be given full credit." App. 8, *infra*. Moreover, he agreed that "Bangladeshi politics is an environment that

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[3] An alien who has not suffered past persecution may qualify for asylum by showing a "well founded" fear of future persecution. This test includes both subjective and objective components. *See Cardoza-Fonseca*, 480 U.S. at 430-31. "[T]he term 'fear,' as used in this statute, refers to 'a subjective condition, an emotion characterized by the anticipation or awareness of danger.' " *Id.* at 431, n.11. The objective element can be satisfied if the applicant demonstrates that there is at least a ten percent chance of future persecution. *Id.* at 431.

is rife with inter-party conflict and violence." App. 12, *infra*. He noted:

> It appears that political parties do seek to undermine each other either through the use of student activists, possibly through the use of thuggery, possibly sometimes even through the use of the so-called Special Powers Act. The purpose of utilizing violence and other means of undermining opponents is, of course, to maintain the party's own political power.

Id. While recognizing that "after December 1991. . . members of the Jatiyo Party did suffer from acts of violence and other depredations in Bangladesh," the immigration judge found that such acts were not part of a "deliberate government policy." App. 13, *infra*. "Additionally," the judge ruled that even if Mr. Hossain had not "been the victim of inter-party conflict and, in fact, had been persecuted directly by an arm of the state," he would not qualify for asylum or withholding because "his feared persecutors are no longer in power in Bangladesh." *Id*.

Although Mr. Hossain filed a timely appeal, the Board rejected that appeal on March 24, 1998. App. 16-36, *infra*. With one member dissenting, the Board found that Mr. Hossain had failed to demonstrate that he had suffered past persecution. *Id*. Specifically, the Board found that "[t]he lone assault during an instance of mob violence does not, standing alone, constitute persecution . . . Nor does the applicant's one brief detention." App. 18, *infra*. Additionally, the Board found that Mr. Hossain "does not have a well-founded fear of persecution," because:

> the BNP is no longer in power, and the record does not suggest that the government of Bangladesh would persecute the applicant at the behest of the BNP. We glean from his testimony that the applicant fears, in essence, additional political violence arising from party conflicts in Bangladesh. The harm he fears is not personal to him, and his personal circumstances do not distinguish him from the population at large. While we are sympathetic to the applicant's apprehension about returning to a troubled country, a fear of civil strife is not grounds for asylum.

App. 18-19, *infra* (citations omitted).

On April 15, 1998, Mr. Hossain petitioned the United States Court of Appeals for the Ninth Circuit to review the Board's decision. On March 10, 1999, a divided panel issued a memorandum opinion denying the petition for review. The court unanimously reversed the Board's finding that Mr. Hossain had not suffered past persecution. It therefore found that the burden had shifted to the INS to show that "conditions in Bangladesh have changed to such an extent that Hossain no longer has a well-founded fear of being persecuted if he were to return." App. 3-4, *infra*. While recognizing that "the BIA did not specifically address this burden of rebuttal," the panel majority found that "the presumption of future [persecution] was rebutted." App. 4, *infra*.

In his concurring and dissenting opinion, Judge Thomas agreed that Mr. Hossain had established past persecution. App. 5, *infra*. However, he dissented because he considered "remand [ ] appropriate to permit the Board of Immigration Appeals to reweigh the evidence in light of the [regulatory] presumption." *Id.*

On May 26, 1999, the court denied Mr. Hossain's petition for rehearing and rehearing *en banc*. This petition for certiorari follows.

REASONS FOR GRANTING THE PETITION

The court of appeals' majority opinion is erroneous for two reasons. First, the panel majority usurped the fact-finding responsibilities of the Board.[4] After noting that the Board had not considered whether the regulatory presumption of future persecution had been rebutted, the panel majority went on to decide the question itself. This is but one of a number of asylum cases in which the Ninth Circuit has usurped the authority of the Board by engaging in factfinding in the first instance. Not only does this action directly conflict with this Court's clear precedent, but it conflicts with the jurisprudence of the United States Court of Appeals for the First Circuit and thus has created a circuit split. Second, the panel majority ignored a fundamental rule of this Court by affirming the Board's decision on a ground not articulated by the Board.

[4] The Attorney General has delegated her administrative authority in matters of asylum and deportation to the Board of Immigration Appeals. *See* 8 C.F.R. § 3.1.

1. The Court of Appeals Impermissibly Usurped the Board's Authority By Acting as a Factfinder in the First Instance.

This Court has long recognized that "[a] court reviewing an [administrative] agency's adjudicative action should accept the agency's findings if those findings are supported by substantial evidence on the record as a whole." *Arkansas v. Oklahoma*, 503 U.S. 91, 113 (1992). *See also Universal Camera v. NLRB*, 340 U.S. 474 (1951); *Federal Radio Comm'n v. Nelson Bros. Bond & Mortgage Co.*, 289 U.S. 266 (1933). "Substantial evidence" means "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938). Under this standard, great deference is due the agency. "[A reviewing] court is not empowered to substitute its judgment for that of the agency." *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 416 (1971).

This standard of review recognizes the proper roles of, and relationship between, an administrative agency and a reviewing court. "It frees the reviewing courts of the time-consuming and difficult task of weighing the evidence, it gives proper respect to the expertise of the administrative tribunal and it helps promote the uniform application of the statute." *Consolo v. Fed. Maritime Comm'n*, 383 U.S. 607, 620 (1966). It also allows the courts to focus on their area of expertise, the determination of whether or not "the agency has misconceived the law." *Securities & Exch. Comm'n v. Chenery Corp.*, 318 U.S. 80, 94 (1943).

An agency's factual determinations "frequently rest upon a complex and hard-to-review mix of considerations," *Consolo v. Fed. Maritime Comm'n*, 383 U.S. at 621, and this is certainly the case in the context of discretionary determinations under the federal immigration laws. In section 208(a) of the Immigration and Nationality Act [8 U.S.C. § 1158(a)], App. 38, *infra*, Congress authorized the Attorney General, in her discretion, to grant asylum to a person who is a "refugee" as defined in section 101(a)(42)(A) of the INA [8 U.S.C. § 1101(a)(42)(A)]. App. 38, *infra*. The Board of Immigration Appeals' factual determinations "can be reversed only if the evidence presented [by the asylum applicant] was such that a reasonable factfinder would have to conclude that the requisite fear of persecution existed." *INS v. Elias-Zacarias*, 502 U.S. 478, 481 (1992).

This case is one of several in which the Ninth Circuit has disregarded these basic principles. Because the Board erroneously found that Mr. Hossain had not suffered past persecution, it never addressed the factual question of whether the regulatory presumption of future persecution (which arises upon a showing of past persecution) had been rebutted. The panel majority explicitly recognized this, stating that "the BIA did not specifically address th[e] burden of rebuttal."[5] App. 4, *infra*.

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[5] That the Board analyzed the well-foundedness of Mr. Hossain's fear is immaterial because it did so under the incorrect legal standard. Because the Board erred in finding that Mr. Hossain had not been persecuted, it never reached the issue of whether the INS had demonstrated, by a preponderance of the evidence, that country conditions had changed to such an extent that Mr. Hossain no longer had a well-founded fear of

Nonetheless, the panel majority went on to decide the factual question of whether the regulatory presumption had been rebutted. In so doing, it engaged in impermissible factfinding, contrary to the established precedent of this Court.

Judge Thomas recognized the proper roles of the court and the agency in his dissent, stating that "where the Board of Immigration Appeals has failed to apply the presumption of future persecution, remand is appropriate to permit the Board of Immigration Appeals to reweigh the evidence in light of the presumption."[6]

Mr. Hossain's case warrants review by this Court because it is but one of a number of decisions in which the Ninth Circuit has, without explanation, engaged in factfinding in the first instance. *See Leiva-Montalvo v. INS*, 173 F.3d 749 (9th Cir. 1999); *Korablina v. INS*, 158 F.3d 1038 (9th Cir. 1998); *Vallecillo-Castillo v. INS*, 121 F.3d 1237 (9th Cir. 1996). In each of these cases, the court reversed the Board's erroneous finding that the petitioner had not been persecuted in the past. Instead of remanding the cases to the Board for further factfinding, the court independently assessed country conditions in light of the regulatory presumption.

The circuit's failure to consistently adhere to Supreme Court precedent was illustrated by Judge Trott

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persecution. Thus it cannot be said that this was a ground on which the Board based its decision.

[6] *See Molina v. INS*, 170 F.3d 1247 (9th Cir. 1999); *Surita v. INS*, 95 F.3d 814 (9th Cir. 1996); *Singh v. INS*, 94 F.3d 1353 (9th Cir. 1996). *See also Garrovillas v. INS*, 156 F.3d 1010 (9th Cir. 1998).

in his dissent in *Vallecillo-Castillo v. INS, supra,* in which he points out that the decision in *Vallecillo-Castillo,* where the court impermissibly engaged in factfinding in the first instance, was issued by the same panel that remanded *Surita v. INS, supra,* and *Singh v. INS, supra,* to the Board for further factfinding. *Vallecillo-Castillo,* 121 F.3d at 1241. Despite "there [being] no principled distinction between these cases," the panel "arrogate[d] power that belongs to others, and in so doing, [was] not faithful to [its] own precedent." *Id.*

The Ninth Circuit's propensity to usurp the Board's factfinding role places that circuit squarely in conflict with the First Circuit. In *Gebremichael v. INS,* 10 F.3d 28 (1st Cir. 1993), the First Circuit reviewed the Board's decision to deny asylum to an Ethiopian national. Although the Board found that the petitioner had not suffered past persecution, the First Circuit reversed, stating that Gebremichael's was "a clear case of '[past] persecution on account of . . . membership in a particular social group.' " *Id.* at 36 (citation omitted). The court thus remanded the case to the Board, recognizing that "Board precedent and agency regulations indicate that the Board will choose to deny asylum if it finds that the agency has proven that it is more likely than not that petitioner lacks a well-founded fear of persecution." *Id.* at 37, n.22.

In order to clearly delineate the proper roles of administrative agencies and reviewing courts, the Court must resolve this circuit split. If not, the specialized authority of the Board will be severely undermined.

Petitioner recognizes that, under some circumstances, such factfinding by a reviewing court may be permissible.

In particular, where the evidence of record permits but one reasonable conclusion, a reviewing court should be able to draw that obvious conclusion. *See Duarte v. INS*, 179 F.3d 1156 (9th Cir. 1999) (noting that the evidence "fails totally to rebut the presumption that [the petitioner] has a well-founded future fear of persecution"). This would be consistent with the Court's decision in *INS v. Elias-Zacarias, supra*, in that the court would be making a finding that no reasonable factfinder could conclude, on the record, that the presumption had been rebutted.

A second situation was identified by the First Circuit in *Fergiste v. INS*, 138 F.3d 14 (1st Cir. 1998). That court held:

> A remand at this stage would permit the INS to argue its case against [the applicant] a second time only because the Board failed to comply with its own regulations. Such an opportunity would allow the agency to benefit from its own error at the expense of [the applicant], and we do not feel that the government is entitled to a second bite of the apple in the circumstances of this case.[7]

The Ninth Circuit, however, has never even attempted to explain its actions in *Leiva-Montalvo*, *Korablina*, or *Vallecillo-Castillo*. Moreover, neither of the two recognized exceptions would in any way justify the Ninth Circuit's holding in Mr. Hossain's case. A reasonable factfinder would not be compelled to find that the

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[7] It is important to note that in *Fergiste*, "the Board did find past persecution, but erroneously regarded itself as bound to reject his application for asylum on the basis of changed country conditions." *Id.* at 20.

presumption had been rebutted in this case. In addition, the *Fergiste* court's rationale is entirely inapposite. By refusing to remand Mr. Hossain's case to the Board, the court effectively *rewarded* the agency for its erroneous conclusion that he had failed to establish past persecution.[8]

2. The Court of Appeals Violated a Fundamental Rule of Administrative Law By Affirming the Board of Immigration Appeals on a Ground Not Invoked By That Agency.

In reviewing the decisions of administrative agencies, this Court has articulated "a simple but fundamental rule of administrative law." *Securities & Exch. Comm'n v. Chenery Corp.*, 332 U.S. 194, 196 (1947):

> [A] reviewing court, in dealing with a determination or judgment which an administrative agency alone is authorized to make, must judge the propriety of such action solely by the grounds invoked by the agency. If those grounds are inadequate or improper, the court is powerless to affirm the administrative action by substituting what it considers to be a more adequate or proper basis. To do so would propel the court into the domain which Congress has set aside exclusively for the administrative agency.

Id.

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[8] Quite simply, the *Fergiste* rationale can only work to the alien's benefit because the reason for the rule is to prevent the government from benefiting from its own error.

"*Chenery* requires that an agency's discretionary order be upheld, if at all, on the same basis articulated in the order by the agency itself . . . For the courts to substitute their . . . discretion for that of the [agency] is incompatible with the orderly functioning of the process of judicial review." *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168-69 (1962). *See also Federal Power Comm'n v. Texaco, Inc.*, 417 U.S. 380, 397 (1974).

Here, the Board of Immigration Appeals concluded that the beating and lengthy detention suffered by Mr. Hossain did not rise to the level of past persecution required to trigger the presumption of a well-founded fear of future persecution. The court of appeals disagreed, finding that the evidence presented "compel[led] the conclusion that Hossain suffered past persecution," App. 3, *infra*, thus triggering the presumption.

Because the Board erred in finding that Mr. Hossain had not suffered persecution, it neither considered nor ruled on the question of whether the presumption had been rebutted by the government. However, after recognizing that the presumption applied, the court of appeals went further and found that "[a]lthough the BIA did not specifically address this burden of rebuttal, it articulated sufficient reasons for us to conclude that the presumption of future persecution was rebutted." App. 4, *infra*. The court of appeals concluded that "substantial evidence supports the BIA's finding that [Mr. Hossain] did not establish a well-founded fear of persecution if he should return to Bangladesh." App. 5, *infra*.

Thus, the court of appeals affirmed the Board's decision "on grounds not invoked by the agency," in violation

of this Court's explicit directives to the contrary. This violation of a fundamental rule of administrative law requires corrective action by this Court.

CONCLUSION

For the reasons stated above, Mr. Hossain respectfully requests that the Court grant his petition for certiorari.

Respectfully Submitted,

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Dated: August 1999

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ISMAIL HOSSAIN, Petitioner, v. IMMIGRATION AND NATURALIZATION SERVICE, Respondent.	No. 98-70424 INS No. A72-968-988 MEMORANDUM* (Filed Mar. 10, 1999)

Petition to Review a Decision of the Immigration and Naturalization Service

Argued and Submitted February 12, 1999
San Francisco, California

Before: WOOD,** THOMPSON and THOMAS, Circuit Judges.

Ismail Hossain ("Hossain") petitions for review of the Board of Immigration Appeals' ("BIA") decision dismissing his appeal from the denial of his applications for asylum and withholding of deportation. Hossain argues that substantial evidence does not support the BIA's determination that he failed to establish past persecution or a well-founded fear of future persecution on account

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

** The Honorable Harlington Wood, Jr., Senior United States Circuit Judge for the Seventh Circuit, sitting by designation.

of his leadership position in Bangladesh's Jatiyo Party. We have jurisdiction under 8 U.S.C. § 1105(a).[1]

Although we agree with Hossain that he established past persecution, we conclude the presumption of future persecution was rebutted and Hossain did not establish a well-founded fear of future persecution. Accordingly, we deny review.

Hossain testified that he was a member of the Jatiyo Party, a minority party in Bangladesh. As a member of the Jatiyo Party, Hossain planned and attended meetings and distributed Party literature. The record shows that, after the Bangladesh National Party ("BNP") gained control of the government in 1991, members of the BNP and the police often disrupted Jatiyo Party meetings. Hossain testified that, on one occasion, members of the BNP severely beat him and others with hockey sticks while he was leading members of the Jatiyo Party in a peaceful procession. Because Hossain was "too hurt to move," he was one of the few people left on the scene when the police arrived.

Believing that Hossain had caused the disruptions, the police arrested Hossain under Bangladesh's "Special

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[1] The Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA") repealed 8 U.S.C. § 1105(a) and replaced it with a new review provision codified at 8 U.S.C. § 1252. *See* IIRIRA § 306(c)(1). Because the new provision does not apply to petitioners whose deportation proceedings commenced before April 1, 1997, however, we continue to have jurisdiction over Hossain's petition under 8 U.S.C. § 1105(a). *See* IIRIRA § 309(c)(1).

Powers Act."[2] Hossain further testified that he remained in jail for one month and that the police told him five or six times during his detention that he would be released only if he agreed to "stop being a member of the Jatiyo Party." Hossain testified that he hid from the BNP for four months following his release, because they were "always on the look out for [him]" and because they threatened his parents. He fled Bangladesh in July 1993.

The foregoing evidence compels the conclusion that Hossain suffered past persecution. *See Montoya-Ulloa v. INS*, 79 F.3d 930, 931 (9th Cir. 1996) (finding past persecution where petitioner was "harassed, threatened and beaten" by a group sponsored by the Sandinista government). Although Hossain's arrest may have fallen within the "ambit and time table" of the Special Powers Act, the police's statements conditioning Hossain's release on his promise to disaffiliate himself from the Jatiyo Party provides evidence of past persecution on account of political opinion.

Because he established past persecution, Hossain is entitled to the presumption of a well-founded fear of future persecution. The burden thus shifts to the INS to show that, since the persecution occurred, conditions in Bangladesh have changed to such an extent that Hossain

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[2] Under this Act, the government or a magistrate may order anyone detained without charge to prevent the commission of an act likely "to prejudice the security of the country." The government or magistrate must inform the detainee of the grounds for the detention within 15 days, and the government must approve the grounds for detention within 30 days or release the detainee.

no longer has a well-founded fear of being persecuted if he were to return. *See* 8 C.F.R. § 208.13(b)(1)(i) (1996).

Although the BIA did not specifically address this burden of rebuttal, it articulated sufficient reasons for us to conclude that the presumption of future presumption [sic] was rebutted. As the BIA observed, the record shows that conditions in Bangladesh have changed substantially. Most significant to Hossain's situation, the BNP has not controlled the parliament since 1996. Even before then, the State Department in its May 1995 Comments on Country Conditions and Asylum Claims ("May 1995 Comments") concluded that, unlike the conditions in 1991 and 1992, Jatiyo Party candidates were now able to campaign freely, hold rallies, and distribute campaign materials.

Although Hossain is correct in arguing that BNP and Jatiyo Party members continue to clash, such instability is reflective of general civil strife that does not form a viable ground for asylum. *See Lopez v. INS*, 775 F.2d 1015, 1017 (9th Cir. 1985). In fact, the May 1995 Comments state that the conditions affect all Bangladeshis and have not become such that Jatiyo Party members can no longer reside there.

Furthermore, there is no evidence in the record that anyone has inquired into Hossain's whereabouts since his departure from Bangladesh. That fact, coupled with the fact that the BNP has not harassed his family at all since his departure, tends to negate a continuing threat of future persecution. *See Cuadras v. INS*, 910 F.2d 567, 571 (9th Cir. 1990).

Given the change of conditions in Bangladesh and the lack of evidence in the record that Hossain has reason to fear the persecution he suffered in the past, we conclude that substantial evidence supports the BIA's finding that he did not establish a well-founded fear of persecution if he should return to Bangladesh. Thus, we affirm the BIA's decision.

Because Hossain failed to satisfy the standard for asylum, he also necessarily failed to satisfy the more rigorous standard for withholding of deportation. *See Leon-Barrios v. INS*, 116 F.3d 391, 394 (9th Cir. 1997).

The petition for review is DENIED.

Hossein [sic] *v. INS;* No. 98-70424.

THOMAS, Circuit Judge, concurring in part and dissenting in part:

I agree that Hossain has established past persecution and that, having done so, he is entitled to a presumption of future persecution. However, where the Board of Immigration Appeals has failed to apply the presumption of future persecution, remand is appropriate to permit the Board of Immigration Appeals to reweigh the evidence in light of the presumption. *See Surita v. INS*, 95 F.3d 814, 821 (9th Cir. 1996); *Singh v. INS*, 94 F.3d 1353, 1360 (9th Cir. 1996). The evidence of changed country conditions standing alone is not, in my opinion, a sufficient basis for the conclusion that Hossain no longer has a

fear of future persecution. *See Osorio v. INS*, 99 F.3d 928, 932-33 (9th Cir. 1996).

I therefore conclude that the Board's order should be reversed, and the matter should be remanded to the Board for a determination of whether the government's evidence is sufficient to overcome the presumption of future persecution to which Hossein [sic] is entitled.

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
San Francisco, California

File No.: A 72 968 988 November 22, 1996

In the Matter of	)	
ISMAIL HOSSAIN	)	IN EXCLUSION
	)	PROCEEDINGS
Applicant	)	

CHARGE: Section 212(a)(7)(A)(i)(I) of the Immigration and Nationality Act.

APPLICATIONS: Asylum; withholding of deportation.

ON BEHALF OF APPLICANT:	ON BEHALF OF SERVICE:
Thipphavone Ark, Esquire	Denise Willett, Esquire

ORAL DECISION OF THE IMMIGRATION JUDGE

The applicant for admission, Mr. Ismail Hossain, is a native and citizen of Bangladesh. At this time, he is 30 years of age.

The charging document in this matter is Exhibit 1. It charges that the applicant is excludable under Section 212(a)(7)(A)(i)(I) of the Immigration and Nationality Act. At a Master Calendar hearing held on September 14th, 1993, the applicant for admission, through his counsel, conceded that he was excludable as charged. Accordingly, the Court does find specifically that the applicant is excludable under Section 212(a)(7)(A)(i)(I) of the Act.

The applicant has made two applications for relief from exclusion and deportation. These are applications

for asylum under Section 208(a) of the Act and for withholding of deportation to Bangladesh under Section 243(h) of the Act. The Court will first consider the application for asylum.

Under Section 208 of the Act, the Court may grant asylum as a matter of discretion to a refugee as defined in Section 101(a)(42)(A) of the Act. This provision defines a refugee as a person who is unable or unwilling to return to, and is unable or unwilling to avail himself of the protection of his native country, because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.

As this definition implies, an application for asylum can be based on a claim of past persecution, or on a claim of a well-founded fear of persecution in the future. If the claim is of the former type, decision making is guided by the principles of *Matter of Chen,* Int. Dec. 3104 (BIA 1989) and *Matter of H-,* Int. Dec. 3276 (BIA 1996). If the claim is of the latter type, then the applicant must demonstrate that his fear is both subjectively and objectively reasonable. The subjective component requires a showing that the fear is genuine. The objective component requires a showing of facts that would support a reasonable fear of persecution. *DeValle v. INS,* 901 F.2d 787 (9th Cir. 1990).

Having stated these standards briefly, the Court will turn to the application before it in this case.

First of all, the Court does not doubt that the applicant is a person whose testimony is credible and should be given full credit. Answers to all questions were

responsive and detailed. Additionally, the applicant was a person of modest and dignified demeanor.

The facts upon which the application is based are as follows. The applicant described himself as a person who was an activist in the Jatiyo political party. This party is the party of the former president of Bangladesh, General Ershad. At first, General Ershad ruled Bangladesh from 1981 until 1986 under the authority of martial law. In 1986 until his resignation from power in December 1991, he ruled the country as its elected president.

After 1991, General Ershad was subjected to prosecution and, at this time, is in prison under sentence for a variety of offenses that are detailed in the background materials in this case. Also, after General Ershad's resignation and subsequent imprisonment, his party, the Jatiyo Party, went into eclipse in Bangladesh. The party that succeeded the Jatiyo Party in power was the Bangladesh National Party, which accumulated the majority of seats in the Bangladesh parliament in 1991.

After General Ershad's retirement and imprisonment, it appears that party strife in Bangladesh, at least between the Bangladesh National Party and the Jatiyo Party, increased. A fair amount of violence ensued. There were numbers of attacks on members of and leaders of the Jatiyo Party.

In 1994, the Jatiyo Party, according to the background materials in Exhibit 6-A, and, to a degree, according to the applicant's credible testimony, aligned itself, at least loosely, with another political party known as the Awami League. Through a variety of activist measures, including a strike on parliamentary procedures, the Awami League,

to a degree, it appears, with the assistance of the Jatiyo Party, initiated a stream of events that led to elections in June 1996. In those elections, the Bangladesh National Party was upset in its parliamentary majority. The Awami League thereupon assumed the majority of seats in the Bangladesh parliament. The Bangladesh National Party obtained the second greatest number of seats in the parliament, and the Jatiyo Party was a distant third to the two other parties.

Against this background are the personal facts that relate to the applicant before the Court now. As noted, the applicant was an activist with the Jatiyo Party even before 1991. He began his association with the party in 1988, for reasons that appear to be honest and idealistic. The applicant appears to have believed in the principles of the Jatiyo Party. At least as he described them, they were, in fact, socially progressive principles.

After 1991, the applicant with his party went into eclipse. His participation in party affairs was less frequent. However, in his native village, Noakhali, the applicant did continue to work as a type of Jatiyo Party organizer and recruiter. Specifically, the applicant participated in the planning and recruiting of students at an educational institution, a college in his village of Noakhali. As the background materials do make clear, the participation of student groups in Bangladeshi politics is, in fact, a significant factor in events in Bangladesh.

In February 1993, the applicant participated in, and, indeed, it appears, took a large role in organizing a march in his native village. The purpose of this march was to express a public demand for the release of General

Ershad from imprisonment. It is, of course, the view of Jatiyo Party loyals that General Ershad was falsely imprisoned in Bangladesh. The march ended in violence. Although the Jatiyo Party marchers were marching in a peaceful manner, they encountered a significant number of Bangladeshi National Party members when the march passed by the latter party's headquarters in the applicant's village. The applicant was seriously beaten by members of the Bangladesh National Party in the course of that encounter.

The police arrived ostensibly to restore civil order. However, by the time the police were on the scene, the members of the Bangladeshi National Party who had been involved in the encounter had run away, as had a number of the Jatiyo Party protestors. The applicant was unable to run away, because he was on the ground at least from the pain he suffered because of the beating. The police arrested the applicant, apparently because he was one of the few persons left on the scene of this violent encounter. The applicant tried to assert to the police that he had not caused the violence, but rather was a victim of the violence. The police nonetheless took him into custody. Along with the applicant, the police took two colleagues and companions in the Jatiyo Party into custody.

The first act of the police was to take the applicant to a clinic where his injuries could be tended to. After that, the police took the applicant and apparently the two other arrestees to the police station. There, the applicant was held for a one-month period. The applicant was not physically abused at any time. However, the applicant did say that approximately five times during the course

of his custody he was visited either by police officers or some type of official who demanded or requested that the applicant cease his activities with the Jatiyo Party. Eventually, the applicant agreed that he would cease such activities. He did so only in order to be released from detention. Approximately two days after his agreement, he was, in fact, released and he returned to the home of his parents in his native village.

Thereafter, or very shortly thereafter, the applicant traveled to Dhaka, where he remained for approximately four months. After that four months, the applicant, fearing further reprisals by the Bangladeshi National Party, departed from Bangladesh on the journey that has brought him eventually to these exclusion proceedings.

The applicant, while in Dhaka, did state that his parent's home had been visited on several occasions by members of the Bangladeshi National Party. During these visits, these party members, according to the applicant, threatened his parents and him with serious harm if the applicant did not truly cease his activities with the Jatiyo Party.

If the background materials and the applicant's testimony make one thing clear, it is that Bangladeshi politics is an environment that is rife with inter-party conflict and violence. It appears that political parties do seek to undermine each other either through the use of student activists, possibly through the use of thuggery, possibly sometimes even through the use of the so-called Special Powers Act. The purpose of utilizing violence and other means of undermining opponents is, of course, to maintain the party's own political power.

It is, of course, the case that, after December 1991, numbers of members of the Jatiyo Party did suffer from acts of violence and other depredations in Bangladesh. However, it does appear to the court that these acts were the result of the inter-party conflict that the Court has just discussed. It does not appear to the Court that there is deliberate government policy in Bangladesh to achieve goals by means of violence. It appears to the Court that Bangladesh is a country where chaotic circumstances have resulted in the type of problems that the applicant and the Jatiyo Party have suffered since the resignation of General Ershad.

Additionally, even if the Court assumes that the applicant had not somehow been the victim of inter-party conflict and, in fact, had been persecuted directly by an arm of the state, the Court notes that his feared persecutors are no longer in power in Bangladesh. It is apparent from the applicant's own testimony that the Bangladeshi National Party, which created his problems is subordinate at this time in the Bangladesh parliament to the Awami League, which had aligned itself to some degree with the Jatiyo Party in seeking to change the government of Bangladesh.

Otherwise, it also appears from the background materials that, although politics have been marked by violence in Bangladesh, elections have, in fact, been relatively free elections. Proof of this, of course, is the fact that the three major parties in Bangladesh, the Bangladesh National Party, the Jatiyo Party, and the Awami League, have all sent members to parliament even since the time of resignation of General Ershad from power.

Accordingly, even if the Court found that the applicant had been persecuted in the past by an arm of the state either acting on the direction of the Bangladeshi National Party, or acting out of a fear of that party, as the applicant testified, the Court does not believe that this applicant has a well-founded fear of persecution in the future in Bangladesh. The Court believes that the applicant's own testimony and the background materials that have been presented, in fact, lead to this conclusion.

Accordingly, the application for asylum must be denied.

If the applicant [sic] for asylum is denied, then the application for withholding of deportation must also be denied. It is well understood in our law that the standard for demonstrating entitlement to withholding of deportation is a much higher standard than that necessary for demonstrating eligibility for asylum. Accordingly, if the applicant cannot demonstrate his eligibility for the latter form of relief, he cannot demonstrate his entitlement to withholding of deportation.

ORDER

IT IS ORDERED that the applications of Ismail Hossain for asylum in the United States and for withholding of deportation to Bangladesh under Sections 208(a) and 243(h) of the Immigration and Nationality Act should be and hereby are denied.

IT IS FURTHER ORDERED that Ismail Hossain be excluded from and deported from the United States.

/s/ Lawrence N. Dicostanzo
LAWRENCE N.
DICOSTANZO
Immigration Judge

U.S. Department of Justice
Executive Office for Immigration Review
Decision of the Board of Immigration Appeals
Falls Church, Virginia 22041

File: A72 968 988 - San Francisco

Date: MAR 24 1998

In re: ISMAIL HOSSAIN

IN EXCLUSION PROCEEDINGS

APPEAL

ON BEHALF OF APPLICANT:

Thipphavone P. Ark, Esquire
360 Pine Street, 3rd floor
San Francisco, California 94104

ON BEHALF OF SERVICE:

Dennise Willett
Assistant District Counsel

EXCLUDABLE:

Sec. 212(a)(7)(A)(i)(I), I&N Act [8 U.S.C. § 1182(a)(7)(A)(i)(I)] – No valid immigrant visa

APPLICATION:

Asylum; withholding of exclusion and deportation

In a decision dated November 22, 1996, the Immigration Judge found the applicant excludable on the charge set forth above and denied his applications for asylum and withholding of deportation under sections 208 and 243(h) of the Immigration and Nationality Act, 8 U.S.C. §§ 1158 and 1253(h). The applicant has appealed that

decision. The appeal will be dismissed. The request for oral argument is denied.

The applicant, a native and citizen of Bangladesh, claims to fear persecution by members of the Bangladesh Nationalist Party (BNP). The applicant testified that he was a local leader for the Jatiyo Party and described how, in February of 1993, he was attacked by BNP members during a political procession and subsequently detained by the police for a month. The applicant also testified that his family has received threats from the BNP on account of him. The applicant believes that he will persecuted upon his return to Bangladesh.

In his oral decision, the Immigration Judge found the applicant entirely credible, but concluded that he had established neither past persecution nor a well-founded fear of persecution. The Immigration Judge decided that the applicant is the victim of inter-party violence and that the harm he suffered was not attributable to the government. The Immigration Judge also concluded, in the alternative, that because the BNP no longer controls the government, changed country conditions belie any well-founded fear of persecution today.

On appeal, the applicant asserts that his beating and incarceration constitute past persecution and that current country conditions have not changed to such an extent that his fear of persecution is not well-founded. The applicant provides several recent news articles and State Department information reporting the BNP's recent violent activities and the current government's inability to control the BNP.

In response, the Immigration and Naturalization Service endorses the decision of the Immigration Judge, contending *inter alia* that the applicant has established neither past persecution nor a well-founded fear of persecution.

Upon review of the record, we find that the applicant has not shown that he has suffered past persecution. The lone assault during an instance of mob violence does not, standing alone, constitute persecution. *Cf. Matter of Sanchez and Escobar,* 19 I&N Dec. 276 (BIA 1985), *aff'd sub nom. Sanchez-Trujillo v. INS,* 801 F.2d 1571 (9th Cir. 1986). Nor does the applicant's one brief detention constitute persecution. *See, e.g., Zalega v. INS,* 916 F.2d 1257 (7th Cir. 1990) (brief detentions not persecution). While we are cognizant that the applicant's release was conditioned on his cessation of political activities, we observe that he was apprehended at a scene of violence and mayhem, that his detention fell within the ambit and time table of authorized law enforcement, and that he was not mistreated while in custody. *Cf. Matter of R-,* 20 I&N Dec. 621 (BIA 1992).

We also find that the applicant does not have a well-founded fear of persecution. As the Immigration Judge observed, the BNP is no longer in power, and the record does not suggest that the government of Bangladesh would persecute the applicant at the behest of the BNP. We glean from his testimony that the applicant fears, in essence, additional political violence arising from party conflicts in Bangladesh. The harm he fears is not personal to him, and his personal circumstances do not distinguish him from the population at large. *See Matter of Sanchez*

and Escobar, supra. While we are sympathetic to the applicant's apprehension about returning to a troubled country, a fear of civil strife is not grounds for asylum. *See id.*

ORDER: The appeal is dismissed.

/s/ Gerald S. Hurwitz
FOR THE BOARD

U.S. Department of Justice
Executive Office for Immigration Review
Decision of the Board of Immigration Appeals

Falls Church, Virginia 22041

File: A72 968 988 - San Francisco

Date: MAR 24 1998

In re: ISMAIL HOSSAIN

DISSENTING/CONCURRING OPINION:

Lory D. Rosenberg, Board Member

I respectfully dissent in part and concur in part.

Although I believe that the asylum seeker in this appeal has been persecuted and/or has a well-founded fear of persecution on a ground that is protected under section 101(a)(42) of the Immigration and Nationality Act (Act) and is eligible for asylum, the majority's denial of asylum appears required by our precedent, and I am bound by the precedent decisions of the Board. 8 C.F.R. 3.1(g). Therefore, I must concur.

I differ, however, not only with the result reached by the majority, but with the reasoning and legal conclusions

that underlie the result they reach. I have articulated these differences in previously published dissenting and concurring opinions, covering various aspects of asylum jurisprudence, including dissenting opinions in *Matter of M-D-*, Interim Decision 33 ___ (BIA 1998); *Matter of A-E-M-*, Interim Decision 3338 (BIA 1998); *Matter of Y-B-*, Interim Decision 3337 (BIA 1998); *Matter of A-S-*, Interim Decision 3336 (BIA 1998); *Matter of O-D-*, Interim Decision 3334 (BIA 1998); *Matter of E-P-*, Interim Decision 3311 (BIA 1997); *Matter of V-T-S-*, Interim Decision 3308 (BIA 1997) (Rosenberg, dissenting); *Matter of T-M-B-*, Interim Decision 3307 (BIA 1997) (Rosenberg, dissenting); *Matter of C-A-L-*, Interim Decision 3305 (BIA 1997). *See also* my views as stated in separate concurring opinions in *Matter of C-Y-Z-*, Interim Decision 3319 (BIA 1997); *Matter of S-M-J-*, Interim Decision 3303 (BIA 1997); *Matter of Kasinga*, Interim Decision 3278 (BIA 1996).

In these published separate opinions and in numerous unpublished separate opinions that I have filed in asylum claims decided by the Board during the past 2 years, I have included an elaboration of my reasoning and the citations to controlling or persuasive authorities that I believe support my perspective. These decisions contain the ten top reasons why, to date, I have differed from a majority of the Board, and dissented. At least one or more of these reasons is pertinent here.

(1) *Well-founded fear of persecution standard.* I believe the majority of the Board either misunderstands or misapplies the well-founded fear standard, which has been interpreted by the Supreme Court as meaning subjective and objective evidence that establishes at least a "10% chance," i.e., a reasonable possibility of persecution. *INS*

v. Cardoza-Fonseca, 480 U.S. 421 (1987). *See also Matter of Kasinga*, Interim Decision 3278 (BIA 1996); *Matter of Mogharrabi*, 19 I&N Dec. 437 (BIA 1987). *Cf. Matter of M-D-, supra; Matter of Y-B-, supra.* The standard under which we judge asylum claims is "reasonableness"; it is not certainty, probability, proof beyond a reasonable doubt, or "definitiveness." *See M.A. v. INS*, 899 F.2d 304, 311 (4th Cir. 1990) (en banc). *But see* my separate opinions in *Matter of M-D-, supra; Matter of Y-B-supra; Matter of A-S- supra; Matter of A-E-M-, supra; Matter of E-P- supra; Matter of T-M-B, supra; Matter of V-T-S-; see also* those in *Matter of C-Y-Z; supra; Matter of S-M-J-, supra.*

(2) *Persecution on account of race, religion, nationality, political opinion or membership in a particular social group.* I believe a majority of the Board assesses the motivation of the persecutor erroneously, contrary to our own precedents and decisions of the lower federal courts and the Supreme Court, which hold that evidence of a mixed motive may establish harm "on account of" a characteristic protected by the statute, by

(a) overlooking and failing to meaningfully evaluate evidence of a mixed motive for persecution on the part of the persecutor. *Compare INS v. Elias-Zacarias*, 502 U.S. 478 (1992) (recognizing that a persecutor may be motivated to harm the victim for more than one reason); *Matter of S-P-*, Interim Decision 3287 (BIA 1996); *Matter of Fuentes*, 19 I&N Dec. 658, 662 (BIA 1988) (recognizing that the asylum seeker's task is simply to demonstrate the reasonableness of a motivation which is related to one of the enumerated grounds); and by,

(b) characterizing a threat or confrontation as nonpolitical or invoking another non-protected motive as "the reason" for the persecution threatened or imposed on the victim. *See e.g. Osorio v. INS*, 18 F.3d 1017, 1028-29 (2d Cir 1994) (stating that according to the Board's view, Alexandr Solzhentizn's dispute with the former Soviet Union would have been aptly characterized, and wrongly dismissed, as literary rather than political). *See also Chang v. INS*, 119 F.3d 1055 (3rd Cir. 1997) (finding that the Board mischaracterized both the political opinion held by the victim of persecution and the politically motivated action on the part of the persecutor); *Rodriguez-Roman v. INS*, 98 F.3d 416, 431 (9th Cir. 1996) (holding that the BIA erred by concluding that severe punishment an alien would suffer upon return to Cuba would be merely criminal prosecution, and not partially on account of political opinion). *Cf. Matter of R-*, 20 I&N Dec. 621 (BIA 1992); *Matter of T-M-B-, supra; Matter of A-E-M-, supra.*

But see my separate opinions in *Matter of A-E-M-, supra; Matter of E-P-, supra; Matter of T-M-B supra; Matter of V-T-S-, supra; Matter of C-A-L-, supra; Matter of C-Y-Z-, supra; Matter of Kasinga, supra.*

(3) *Objective and subjective evidence of feared harm that rises to a level sufficient to constitute the possibility of persecution on a protected ground.* I believe a majority of the Board improperly dismisses legitimate asylum claims by focusing on what has not happened rather than on the possibility that persecution could occur, contrary to guidance in the Office of the High Commissioner on Refugees *Handbook on Procedures and Criteria for Determining Refugee Status Under the 1951 Convention and the 1967 Protocol*

Relating to the Status of Refugees (Geneva, 1992) ("*Handbook*"), "[t]he cumulative effect of the applicant's experience must be taken together . . . although no single incident may be sufficient, all the incidents related by the applicant taken together, could make his fear 'well-founded[.]' " *Id*, para. 201, at 48;[1] and when, in fact,

(a) an asylum seeker is not required to establish that past incidents of mistreatment constituted persecution in order to establish a well-founded fear of future persecution. *See Shirazi-Parsa v. INS*, 14 F.3d 1424 (9th Cir. 1994) (holding that evidence that an individual was interrogated and released does not foreclose a well-founded fear of persecution in the future); *see also Abdel-Masieh v. INS*, 73 F.3d 579, 583 (5th Cir. 1996) (reversing the Board's denial of asylum to one who had been detained but not mistreated to the degree that would constitute "persecution," because there "is little reason to generally suppose . . . [that such past actions] create an 'outer limit' on [the government's] future actions.");

(b) a claim of persecution does not require that the asylum seeker be permanently, physically harmed for the mistreatment imposed to rise to the level sufficient to be considered persecution; otherwise only those fortunate enough to be maimed but not killed would not qualify. *See Cordero-Trejo v. INS*, 40 F.3d 482 (1st Cir. 1994), citing

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[1] Although not binding on the Immigration Judge or the Board, adherence to the letter and spirit of these guidelines is consistent with the purpose of the 1967 Protocol, to which the United States is a signatory. *INS v. Cardoza-Fonseca*, 480 U.S. 421 (1987); *Matter of Rodriguez-Palma*, 17 I&N Dec. 465, 468 (BIA 1980).

Del Valle v. INS, 776 F.2d 1407, 1413 (9th Cir. 1985); *see also Surita v. INS*, 95 F.3d 814 (9th Cir. 1996); *Sotelo-Aguije v. Slattery*, 17 F.3d 33, 37 (2d Cir. 1994) (stating that the mere fact that an applicant has not yet been physically harmed by the individuals or group that he claims to fear, or *has not had a face-to-face encounter with the guerrillas*, does not indicate that he lacks a well-founded fear of persecution) (emphasis added); *Turcios v. INS*, 821 F.2d 1396, 1402 (9th Cir. 1987); and,

(c) although the mistreatment of family members known to share an asylum seeker's views or other attributes may have a bearing on the assessment of the likelihood of persecution suffered or feared by an asylum applicant, the majority uses this factor generally not to substantiate the asylum seeker's claim, but to defeat it, even where there is no evidence that the family members were known to or sought by the persecutor. *See Matter of A-E-M-, supra.* (relying on *Cuadras v. INS*, 910 F.2d 567, 571 (9th Cir 1997) which involved the absence of harm to family members who had been threatened with harm simultaneously with the asylum seeker, but remained in the country when he fled); *Matter of E-P-, supra; Cf. Matter of Villalta*, 20 I&N Dec. 142 (BIA 1990) (holding that politically motivated threats of harm to immediate family who remained behind supported well-founded fear of persecution). *Compare Handbook* (stating that an applicant need not show a threat of persecution based on personal experience, as evidence concerning relatives may support the conclusion that fear is well founded); *Ananeh-Firempong v. INS*, 766 F.2d 621 (1st Cir. 1985); *Ramos-Vasquez v. INS*, 57 F.3d 857 (9th Cir. 1995) (citing *Ariaga-Barrientos v. INS*, 937 F.2d 411, 414 (9th Cir. 1991)) (finding that a

pattern of violence against friends and family closely tied to the petitioner may establish a well-founded fear). *But see Matter of A-E-M-, supra; Matter of E-P-, supra; Matter of V-T-S-, supra; Matter of C-A-L-, supra.*

(4) *Unwillingness and inability to return to or obtain protection in the country in which persecution is claimed.* I believe that the majority decisions of the Board continue to view the possibility of internal relocation erroneously, resulting in the unreasonable denial of valid asylum claims. *Singh v. Ilchert*, 63 F.3d 1501 (9th Cir. 1995) (imposing presumption of countrywide persecution when persecutor is the government); *Damaize-Job v. INS*, 787 F.2d 1332, 1336 (9th Cir 1985) (recognizing the likelihood of persecution by a group that operates nationwide whether or not the victim was threatened nationwide); *see also* J. Hathaway, *The Law of Refugee Status* 134 (1991) (concluding that the internal relocation principle has been interpreted as a limited restriction, applicable to persons who "can *genuinely access* domestic protection and for whom the reality of protection is meaningful") (emphasis in original). There is no statutory, constitutional or international requirement that an asylum applicant demonstrate "country-wide persecution" because "[T]here is also no reason . . . why the fear of persecution should relate to the whole of the asylum-seeker's country of origin. . . . " Guy Goodwin Gill, *The Refugee In International Law* 42 (1983); *Handbook*, para 91 (clarifying that proof of country-wide danger is not an absolute requirement, stating that, "[T]he fears of being persecuted need not always extend to the *whole* territory of the refugee's country of nationality"); *Matter of H-*, Interim Decision 3276, at 19 n.7 (BIA 1996).

But see my separate opinions in *Matter of A-E-M-, supra; Matter of T-M-B-; supra; Matter of V-T-S-, supra; Matter of C-A-L-, supra.*

(5) *Past persecution and changed country conditions.* I believe that the majority decisions of the Board construe past persecution claims involving allegedly changed conditions in the country of persecution incorrectly, as though they dispositively extinguish such claims without regard either, to the conditions that existed when the asylum seeker fled, or, to the individual impact of those changes on the reasonableness of an asylum seeker's fear of persecution. To the contrary.

(a) a claim of past persecution does not warrant the imposition of a higher standard of proof. *See INS v. Cardoza-Fonseca, supra,* at 449-50; *Draganova v. INS,* 82 F.3d 716, 721 (7th Cir. 1996) (holding that the evidence presented need not conclusively prove that the applicant suffered past persecution . . . "[w]e see no reason to set a greater burden of proof – such as conclusive proof – for a claim of past persecution than for a claim that persecution would occur in the future); and,

(b) once established, the fact of past persecution creates a presumption of future persecution, which, as a practical matter, shifts the burden to the Service to prove that conditions in the country of persecution have changed *sufficiently* to overcome even a 10% chance, or a reasonable possibility, that the asylum seeker could face persecution in the future. 8 C.F.R. 208.13; 208.16, *Matter of H-, supra; see also Gonzales v. INS,* 82 F.3d 903, 911 (9th Cir.

1996) (criticizing the Board for failing to discuss the evidence "as it stood when [the applicant's] hearing concluded" and stating that the passage of time and change of government in a country is not dispositive of whether an asylum applicant has established a well-founded fear of persecution).

But see my separate opinions in *Matter of A-E-M-, supra; Matter of E-P- supra; Matter of T-M-B-, supra; Matter of V-T-S-, supra; Matter of C-A-L-, supra.*

(6) *Consideration of State Department reports.* I believe that a well-founded fear of persecution should not be judged implausible or rebutted by a recent report of the Department of State without regard to how such changes specifically affect the asylum seeker's individual claim, and with regard to whether such changes in country conditions diminish the likelihood of persecution to a less than a ten percent possibility. It is both unfair and unreasonable to read these reports selectively, or to conclude without a hearing, under circumstances in which administrative notice is taken, that the fact of the change has eliminated the danger to the applicant. *See Gonzalez-Neyra v. INS*, 113 F.3d 1293 (9th Cir. 1997), *petition for reh'g denied and opinion amended at* ___ F.3d ___, 1998 WL 3590 (9th Cir. Jan. 6, 1998). *See also Gonzales v. INS, supra*, at 911 (finding the respondent had been denied a fair opportunity to establish that the change of government did not obviate the likelihood of persecution); accord *Getechew v. INS*, 25 F.3d 841, 847 (9th Cir. 1994); *Castillo-Villagra v. INS*, 972 F.2d 1017 (9th Cir. 1992). *Cf. Matter of H-M-*, 20 I&N Dec. 683 (1993).

But see my separate opinions in *Matter of M-D-, supra; Matter of Y-B-, supra; Matter of A-E-M-, supra; Matter of E-P-, supra; Matter of T-M-B-, supra.*

(7) *Burden of proof in relation to credibility.* I believe that a majority of the Board has erroneously elevated the burden of proof we apply to determinations involving claims of past persecution and of a well-founded fear of persecution, in violation of the Supreme Court's ruling in *INS v. Cardoza-Fonseca, supra.* In addition, I believe that, in practice, our decisions impose an improper presumption that an asylum seeker's consistent, detailed and plausible testimony is not trustworthy evidence sufficient to satisfy the burden of proof, as well as that submission of a document that appears inconsistent or irregular irreparably taints the entirety of an asylum claim, without regard to the evidence on the record as a whole; by

(a) impermissibly minimizing the importance of testimony in the asylum context, when there is no presumption that the asylum seeker is fabricating his or her story, and our precedents hold that credible and plausible testimony in the record, although uncorroborated, is adequate to satisfy the burden of proof. *See Figueroa v. INS,* 886 F.2d 76 (4th Cir. 1989), stating that "the fact an applicant is an alien does not mean the Board is entitled to presume he is a liar. . . . In other words, there is no presumption that an asylum applicant's testimony is to be treated as other than truthful . . . " *Id. Matter of S-M-J-, supra; Matter of Mogharrabi, supra; see also Matter of Silhasle,* 11 I&N Dec. 531, 532-533 (BIA 1960) (holding that the asylum applicant's testimony must be accorded the most careful and objective evaluation possible as it may be the only evidence available).

(b) inappropriately relying on a comparison between an asylum seeker's testimony in a hearing and the statements in his or her written application (form I-589) that is submitted in advance of the hearing, as dispositive of credibility; and treating an omission of information in the written application as constituting an inconsistency when more fully elaborated testimony is presented in the hearing, or conversely, treating the failure to testify about each and every item of information provided in the application, as reasons supporting an adverse credibility finding. To the contrary, *Matter of Fefe*, 20 I&N Dec. 116 (BIA 1989), reflects that it was specifically contemplated that there would be instances "where an alien establishes eligibility for asylum *by means of his oral testimony when such eligibility would not have been established by the documents alone.*" *Id.* at 118. (emphasis added). I note that the *Handbook*, also anticipates that completion of a "standard questionnaire" ordinarily will not provide an adequate basis on which to judge the claim, and that it will be necessary to gain the confidence of the asylum seeker "in order *to assist* the latter in putting forward his case and in fully explaining his opinions and feelings." *Id.* at para. 200. (emphasis added); *see also Matter of S-M-J-, supra*;

(c) erroneously presuming that the presence of an inconsistency, the fact of an omission, or the submission of a document that appears not to be genuine, taints the claim by indicating an overall lack of credibility, where the adjudicator has made no effort to clarify or resolve any inconsistencies or contradictions and no meaningful inquiry into the circumstances surrounding

the asylum seeker's obtaining or submitting a false document, as contemplated by the *Handbook*, and has not weighed and balanced the false or inaccurate information in light of the evidence on record as a whole. *Cf. Handbook* para. 199, at 47, stating that it is up the to asylum adjudicator (in this instance, the Immigration Judge) to attempt to "resolve any contradictions . . . and to find an explanation for any misrepresentation or concealment of material facts"; and,

But see my separate opinions in *Matter of M-D-, supra; Matter of A-S-, supra; Matter of Y-B-, supra; Matter of O-D-, supra; Matter of S-M-J-, supra; Matter of Kasinga, supra.*

(8) *Burden of proof and deference to the Immigration Judge.* I believe that, in the context of asylum claims, credibility determinations constitute mixed questions of fact and law, and that such findings require some degree of meaningful review by the Board, as these findings are inextricably tied to the respondent's burden of proof and can make or break a claim. I do not agree that the degree of deference toward the findings and conclusions of the Immigration Judge which our decisions now appear to require is an appropriate one, especially in cases involving credibility findings not based on demeanor, in that,

(a) in many cases the Immigration Judge has taken no steps to assist the asylum-seeker in developing his or her claim on the record, whereas, in *Matter of S-M-J-, supra*, we explicitly recognized our obligation to offer refuge to persons who qualify for relief in the forms of asylum and withholding of deportation, cited the guidelines for asylum adjudicators set forth in the *Handbook* with approval, and advised that in light of the adversarial

nature of a hearing before an Immigration Judge, "a cooperative approach in Immigration Court is particularly appropriate." We observed that "while the burden of proof in principle rests on the applicant, the duty to ascertain and evaluate all the relevant facts is shared between the applicant and the examiner," and that it is the Immigration Judge's role to "[e]nsure that the applicant presents his case as fully as possible and with all available evidence." *Id.* at 10 (citing *Handbook* para. 196 at 47; para. 205(b)(I) at 49);

(b) a requirement that an Immigration Judge's credibility findings are entitled to deference only where they are supported by specific, cogent reasons, *"constitutes the beginning and not the end of our inquiry,"* and entails an evaluation of those reasons "to determine whether they are valid grounds on which to base a finding that the applicant is not credible." *Aguilera-Cota v. INS*, 914 F.2d 1375, 1381 (9th Cir. 1990), citing *Vilorio Lopez v. INS*, 852 F.2d 1137, 1142 (9th Cir. 1988); *see also Osorio v. INS*, 99 F.3d 928, 931 (9th Cir. 1996); *Lopez-Reyes v. INS*, 79 F.3d 908, 911 (9th Cir. 1996). *Cf. Matter of A-S-, supra.* Semantic identity notwithstanding, the specific and cogent reasons rule as articulated by the federal courts is distinct from the deferential standard practiced by a majority of the Board. Specifically, the presence of greater detail in the asylum seeker's testimony as compared to his asylum application, the existence of discrepancies in dates, and the use of an incorrect acronym for a political group – each of which have been cited by the majority as bases for upholding the adverse credibility determinations of Immigration Judges in cases that I have reviewed – has been rejected as constituting rational bases on

which to find an asylum seeker not credible. *Compare Osorio v. INS, supra; Lopez-Reyes v. INS supra,* at 912; *Vilorio Lopez v. INS, supra,* at 1137, 1142; *Aguilera-Cota v. INS, supra,* at 1382; and,

(c) the factual records made in many of the hundreds of hearings that I have reviewed over the past two and a half years cannot have been thoroughly or accurately considered by the Immigration Judge, who, at the time of rendering an oral or written decision, had no access to a transcript of the testimony presented at the hearing and must rely on his or her notes. *Matter of B-,* Interim Decision 3251 (BIA 1995); yet, as applied practically, the majority's concept of deference seems to result in almost exclusive and uncritical reliance on the Immigration Judge's findings, even when contradicted by the transcript and even when they are far more legal than factual in nature. *See e.g., Matter of M-D-, supra.*

But see my separate opinions in *Matter of M-D-, supra; Matter of A-S-, supra; Matter of Y-B-, supra; Matter of O-D-, supra; Matter of S-M-J-, supra; Matter of E-P-, supra.*

(9) *Burden of proof and the benefit of the doubt.* As I have stated frequently, we long ago acknowledged that ready dismissal of a respondent's claims on technicalities will not do. *See Matter of Martinez-Solis,* 14 I&N Dec. 93, 95 (BIA 1972) (holding that a contested deportation hearing is a "quest for truth," not a sporting event). Although the Board's decision in *Matter of S-M-J-, supra,* acknowledges the applicability of the concept of "benefit of the doubt" in the *Handbook,* which states that the asylum seeker obviously is not required to "prove" every element of his case, so " '[i]t is therefore frequently necessary to

give the applicant the benefit of the doubt . . . when all available evidence has been obtained and checked" and where the adjudicator "is satisfied as to the applicant's general credibility." *Matter of S-M-J-, supra,* at 5 (citing *Handbook,* para. 203, 204 at 48), I believe that the Board's recent precedents abrogate these principles, in that,

(a) they overlook the reality faced by asylum seekers, and the obligation of those adjudicating asylum claims, which requires that an accurate depiction of "the applicant's experience" should include such considerations as an applicant's illiteracy, unfamiliarity with communicating verbally or in great detail, and, owing to past experience, general fear of authorities such as asylum officers and Immigration Judges. *See, e.g., Castro-O'Ryan v. United States Dep't of Imm. & Naturalization,* 847 F.2d 1307 (9th Cir. 1988);

(b) unreasonably dismiss an asylum-seeker's explanations for omissions, or alleged inconsistencies or discrepancies, when the reasons offered for these differences are ones that relate to fear, trauma, unfamiliarity with the asylum process, or other circumstantial impediments that may have interfered with the initial preparation of the application, and refuse such explanations for the absence of corroborating documentation of facts believed to be "easily subject to verification" *Id.* at 6 (emphasis added). *See Matter of M-D-, supra; Matter of Y-B- supra; Matter of A-S- supra. Cf. Matter of S-M-J-, supra.* (Rosenberg concurring) (expressing concern that the tendency to disbelieve the uncorroborated testimony of asylum seekers, which may have formed, in part, the subtext for our requirement of documentation, may skew our

assessment of any explanation given for the lack of documentation). *Compare Matter of Kasinga, supra* (finding an asylum seeker credible despite her testimonial discrepancies concerning who performed the act of persecution as part of a tribal marriage ritual and despite possible contradictions as to whether and when she was married, and rejecting the Immigration Judge's reliance on the asylum seeker's lack of knowledge where her family was located and the identity and location of third parties who assisted her in her flight, as bases to find that she lacked credibility); and

(c) the application of these decisions in practice is inconsistent with the principle that that [sic] "if the applicant's account appears credible, he should, *unless there are good reasons to the contrary*, be given the benefit of the doubt." *Handbook*, para. 196, at 47 (emphasis added), as I have yet to see the benefit extended by the majority consistently with the *Handbook* provision.

But see my dissenting views in this regard in separate opinions in *Matter of M-D-, supra; Matter of A-S-, supra; Matter of Y-B- supra; Matter of O-D- supra; Matter of E-P-, supra.*

(10) *Denovo* [sic] *authority and administrative review.* I believe that despite our independent review authority, the majority has elected to treat whatever findings or conclusions that may resemble a credibility determination by the Immigration Judge as entitled to affirmance as a matter of virtually unqualified deference and that, regrettably, our recent decisions seem to prefer the quickest way out of exercising our authority to adjudicate on

review the tough questions posed by asylum claims, opting for acquiescence to the decision of an individual Immigration Judge, when,

(a) by contrast, the regulations explicitly recognize the Board as an appellate authority and authorize the Board to exercise its independent (de novo) judgment in appeals, empowering us to take whatever action is appropriate and necessary to achieve a disposition of the case. 8 C.F.R. 3.1(a)(1), 3.1(d); and the approach taken by the majority compromises the due process right to administrative appeal that is provided by regulation, and that is in accordance both with constitutional and international considerations. *See* 8 C.F.R. 3.38, 242.2. *See also Maldonado-Perez v. INS*, 865 F.2d 328, 333 (D.C. Cir. 1989) (holding that the Act implements the constitutional requirements of a fair hearing); *Handbook* paras. 190, 191, and 192, at 45-46 (providing that, if the applicant is not recognized as a refugee, he should be given a reasonable time to appeal for a "formal reconsideration" of the decision, either to the same or to a different authority); and

(b) results in our upholding decisions of the Immigration Judge that are not supported by substantial evidence considered on the record as a whole, which requires that the adjudicator's decision reflect that she considered and weighed not only that evidence which supports her ultimate conclusion, but the evidence that detracts from it. *Universal Camera Corp. v. N.L.R.B.*, 340 U.S. 474, 491 (1951); *see also Cordero Trejo v. INS, supra*, at 487 (stating that deference is not due to the agency "where findings and conclusions are based on inferences or presumptions that are not reasonable [sic] grounded in

the record taken as a whole" or are "merely personal views of the Immigration Judge"); *Id.* 490-491.

But see Matter of M-D-, supra; Matter of A-S-, supra; Matter of Y-B-, supra; Matter of A-E-M-, supra; Matter of O-D-, supra; Matter of E-P-, supra; see also Matter of S-M-J-, supra.

Similarly, for many of the foregoing reasons, I disagree with the approach taken and the authorities relied upon by the majority in deciding this appeal. Although the dispositive issue may, in whole or in part, already may [sic] have been addressed in one or more precedent asylum decisions in which my views did not prevail, a repeated dissent in which a decision maker refuses to yield to the views of the majority has been recognized as constituting an appropriate statement by the judge as an individual: "Here I draw the line." Justice William J. Brennan, *In Defense of Dissent*, 37 Hastings L.J. 427 (1986).

I commend all of the above-cited decisions – including both the majority opinion and the separate opinions – to the asylum seeker and his or her representative. As I have indicated quite bluntly in my prior opinions, I find the majority's interpretation of the elements in the refuge [sic] definition contained in the statute and its recent articulation of the standards we will use to review evidence in the record, to impede the making of successful asylum claims rather than to facilitate them. The foregoing list constitutes the top ten errors that I believe the Board is making in our review of asylum claims, and the reasons for my dissent.

/s/ Lory D. Rosenberg
Lory D. Rosenberg
Board Member

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ISMAIL HOSSAIN, Petitioner, v. IMMIGRATION AND NATURALIZATION SERVICE, Respondent.	No. 98-70424 INS No. A72-968-988 ORDER (Filed May 26, 1999)

Before: WOOD,[1] THOMPSON and THOMAS, Circuit Judges.

The panel, as constituted above, has unanimously voted to deny the petition for rehearing. Judge Thomas voted to deny the petition for rehearing en banc, and Judges Wood and Thompson recommended denial.

The petition for en banc rehearing has been circulated to the full court, and no judge of the court has requested a vote on the petition for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing, and the petition for rehearing en banc, are DENIED.

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[1] The Honorable Harlington Wood, Jr., Senior United States Circuit Judge for the Seventh Circuit, sitting by designation.

Section 101(a)(42)(A) of the Immigration and Nationality Act

[8 U.S.C. § 1101(a)(42)(A)]

(42) The term "refugee" means –

(A) any person who is outside any country of such person's nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided, and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion, or

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Section 208(b)(1) of the Immigration and Nationality Act

[8 U.S.C. § 1158(b)(1)]

(b) Conditions for Granting Asylum

(1) In general

The Attorney General may grant asylum to an alien who has applied for asylum in accordance with the requirements and procedures established by the Attorney General under this section if the Attorney General determines that such alien is a refugee within the meaning of section 101(a)(42)(A).

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8 C.F.R. § 208.13(b)(1)(i)

(i) If it is determined that the applicant has established past persecution, he or she shall be presumed also to have a well-founded fear of persecution unless a preponderance of the evidence establishes that since the time the persecution occurred conditions in the applicant's country of nationality or last habitual residence have changed to such an extent that the applicant no longer has a well-founded fear of being persecuted if he or she were to return.

Supreme Court, U.S.
FILED
OCT 25 1999

No. 99-340

In the Supreme Court of the United States

ISMAIL HOSSAIN, PETITIONER

v.

IMMIGRATION AND NATURALIZATION SERVICE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals erred in upholding the Board of Immigration Appeals' determination that petitioner lacked a well-founded fear of persecution.

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In the Supreme Court of the United States

No. 99-340

ISMAIL HOSSAIN, PETITIONER

v.

IMMIGRATION AND NATURALIZATION SERVICE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-6) is unpublished, but the judgment is noted at 172 F.3d 876 (Table). The decision and order of the Board of Immigration Appeals (Pet. App. 16-36) and the decision and order of the immigration judge (Pet. App. 7-15) are unreported.

JURISDICTION

The court of appeals entered its judgment on March 10, 1999. A petition for rehearing was denied on May 26, 1999 (Pet. App. 37). The petition for a writ of certiorari was filed on August 24, 1999. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Immigration and Nationality Act of 1952 (INA), 8 U.S.C. 1101 *et seq.*, as amended by the Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102, provides that an alien will be considered a "refugee" if he "is unable or unwilling to return to" the country of his nationality "because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion." 8 U.S.C. 1101(a)(42)(A) (1994 & Supp. IV 1998). If the "Attorney General determines" that an alien qualifies as a refugee, the Attorney General may grant that person asylum in the United States, 8 U.S.C. 1158(a). An alien claiming eligibility for asylum need only demonstrate a reasonable fear or risk of persecution. See *INS* v. *Cardoza-Fonseca*, 480 U.S. 421, 430-441 (1987). The alien bears the burden of proving that he is a refugee because he has the requisite fear of persecution. 8 C.F.R. 208.13(a). Once an alien has established eligibility for asylum, the decision whether to grant or deny asylum falls within "the discretion of the Attorney General." 8 U.S.C. 1158(a).[1]

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[1] Section 604 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, Div. C, Tit. VI, Subtit. A, 110 Stat. 3009-690, significantly revised the INA's asylum provision. That amendment, however, does not govern the present case because it applies to applications for asylum filed on or after April 1, 1997. IIRIRA § 604(c), 110 Stat. 3009-694. The changes in asylum effected by the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, Tit. IV, Subtit. C, § 421(a), 110 Stat. 1270, do apply to this case because the AEDPA amendment governs asylum determinations made on or after the amendment's effective date of April 24, 1996. AEDPA § 421(b), 110 Stat. 1270. The AEDPA amendment, however, is not pertinent to petitioner's claim.

If an alien proves that he or she was a victim of persecution in the past, a presumption arises that the alien has a well-founded fear of future persecution. 8 C.F.R. 208.13(b)(1)(i). The burden then shifts to the Immigration and Naturalization Service (INS) to rebut that presumption through showing, by a preponderance of the evidence, that "since the time the persecution occurred conditions in the applicant's country of nationality * * * have changed to such an extent that the applicant no longer has a well-founded fear of being persecuted if he or she were to return." *Ibid.* If the INS rebuts the presumption, the application for asylum "shall be denied," 8 C.F.R. 208.13(b)(1)(ii), unless the "severity of the past persecution" provides "compelling reasons" for the applicant's fear of returning, *ibid.*[2]

In addition, "if the Attorney General determines" that an alien's "life or freedom would be threatened" in the country of deportation "on account of race, religion, nationality, membership in a particular social group, or political opinion," the alien may be eligible for "withholding of deportation or return." 8 U.S.C. 1253(h)(1) (1994). To be entitled to relief under that provision, the alien must demonstrate a "clear probability of persecution." *INS* v. *Stevic*, 467 U.S. 407, 430 (1984); 8 C.F.R. 208.16(b) (applicant bears the burden of proof of eligibility for withholding of deportation). If the alien makes such a showing, withholding of deportation is mandatory. 8 U.S.C. 1253(h)(1).[3]

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[2] Petitioner does not contend that the latter exception is at issue in this case.

[3] IIRIRA substantially revised the INA's withholding-of-deportation provisions, see IIRIRA, Div. C, Tit. III, Subtit. A, § 305(a)(3), 110 Stat. 3009-602, which are now codified at 8 U.S.C. 1231(b)(3) (Supp. IV 1998). IIRIRA does not govern the present case because its provisions apply only to withholding applications

2. Petitioner is a native and citizen of Bangladesh, where he was a member of the Jatiyo Party. At the time petitioner joined, the head of the Jatiyo Party was the President of Bangladesh. Pet. App. 7, 9. Petitioner attended meetings, participated in demonstrations, and distributed literature for the Party. *Id.* at 2. In 1991, the Bangladesh National Party gained control of the government, and members of that party and the police began to disrupt Jatiyo Party meetings. *Ibid.*

Petitioner testified that, on one occasion, National Party members attacked members of the Jatiyo Party during a peaceful demonstration in which petitioner was participating. During that incident, National Party members beat petitioner with sticks until he was "too hurt to move." Pet. App. 2. When police arrived on the scene, they arrested petitioner and then immediately took him to a medical clinic for treatment of his injuries. *Id.* at 11. After his medical treatment, the police detained petitioner for one month. *Ibid.*[4] Although petitioner does not allege that he was mistreated by the Bangladeshi police, approximately five times during his month-long incarceration police officers "demanded or requested" that he cease his activities with the Jatiyo Party, and indicated that he would not be released until he disavowed his party affiliation. *Id.* at 11-12. In the

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filed by aliens who are placed in proceedings on or after April 1, 1997. IIRIRA, § 309(a), 110 Stat. 3009-625. AEDPA's changes to the withholding provision (see Pub. L. No. 104-132, Tit. IV, Subtit. B, § 413(f), 110 Stat. 1269) do apply because the Board's final decision was not issued until after AEDPA's date of enactment. See § 413(g), 110 Stat. 1269-1270; see also *INS* v. *Aguirre-Aguirre*, 119 S. Ct. 1439, 1443 (1999). The AEDPA amendments, however, are not pertinent to petitioner's claim.

[4] That period of detention apparently was authorized under Bangladeshi law. Pet. App. 3 & n.2.

four months following his release, National Party members threatened petitioner and his parents with harm if petitioner did not cease his Jatiyo Party activities. *Id.* at 12.

3. Petitioner attempted to enter the United States in September 1993 without a valid entry document and was immediately detained and placed in exclusion proceedings, pursuant to 8 U.S.C. 1182(a)(7)(A)(i)(I). Pet. 4. During those proceedings, petitioner applied for asylum and withholding of deportation. Pet. App. 7-8. The immigration judge rejected petitioner's application. *Id.* at 7-15. The immigration judge first found that petitioner was the victim of private "inter-party conflict" and "chaotic circumstances," rather than a victim of persecution at the hands of the government. *Id.* at 13. Second, the immigration judge ruled that, even if petitioner had been persecuted in the past, petitioner's "own testimony and the background materials that have been presented" demonstrated that he did not have a well-founded fear of further persecution, because the National Party is no longer in power in Bangladesh, a party friendly to Jatiyo is currently in control of the government, and the Jatiyo Party is well-represented in Parliament. *Id.* at 14.

The Board of Immigration Appeals affirmed. The Board first agreed with the immigration judge that neither the "lone assault during an instance of mob violence" nor the brief detention constituted past persecution. Pet. App. 18. The Board also adopted the immigration judge's "alternative" (*id.* at 17) holding that, even if he was persecuted in the past, petitioner lacks a well-founded fear of persecution in the future due to the political changes that have occurred in Bangladeshi politics since the early 1990s. *Ibid.* Beyond that, the Board concluded, petitioner's general-

ized concerns about party conflicts and political upset in Bangladesh "do not distinguish him from the population at large"; "a fear of civil strife is not grounds for asylum." *Id.* at 18-19.

4. The court of appeals affirmed. Pet. App. 1-6. Disagreeing with the Board and the immigration judge, the court held that the evidence in the record "compels the conclusion that [petitioner] suffered past persecution" when he was attacked by National Party members and detained by the police. *Id.* at 3. The court, nevertheless, affirmed because the Board "articulated sufficient reasons for us to conclude that the presumption of future [persecution] was rebutted." *Id.* at 4. In particular, the court agreed that "the record shows that conditions in Bangladesh have changed substantially" since petitioner's departure. *Ibid.* The court further agreed with the Board's finding that the remaining instability in Bangladesh was reflective of general civil strife, which did not form the basis for a viable asylum claim. *Ibid.*

Judge Thomas dissented on the ground that the appropriate course of action after finding past persecution was to remand the case to the Board to determine whether the presumption of a well-founded fear had been rebutted. Pet. App. 5-6.

ARGUMENT

The unpublished decision of the court of appeals presents no issue warranting review by this Court.

1. Petitioner contends (Pet. 12-14) that the court of appeals' failure, after finding past persecution, to remand for the Board to determine whether the resulting presumption of a well-founded fear of persecution had been rebutted conflicts with decisions of the First Circuit. No such conflict in circuit law exists. The general

rule is, as petitioner documents (Pet. 14-15 (citing *e.g.*, *SEC* v. *Chenery Corp.*, 332 U.S. 194, 196 (1947))), that courts of appeals should remand for the Board to evaluate the record and apply the law to individual applicants in the first instance. Contrary to petitioner's claim of a conflict, however, published case law in both the First and Ninth Circuits recognizes that, when the court finds past persecution but the Board did not, courts generally should remand to the Board to apply the presumption and to determine whether it has been rebutted. See, *e.g.*, *Surita* v. *INS*, 95 F.3d 814, 821 (9th Cir. 1996); *Singh* v. *INS*, 94 F.3d 1353, 1361 (9th Cir. 1996); *Gebremichael* v. *INS*, 10 F.3d 28, 36 n.22 (1st Cir. 1993).

The general rule that a court of appeals should remand to the Board when it finds a legal error in the Board's decision is not without exception, as petitioner himself admits (Pet. 12-13). Most importantly for present purposes, this Court "will *uphold* a decision of less than ideal clarity if the agency's path may reasonably be discerned." *Bowman Transp., Inc.* v. *Arkansas -Best Freight Sys., Inc.*, 419 U.S. 281, 285-286 (1974) (emphasis added); *Colorado Interstate Gas Co.* v. *FPC*, 324 U.S. 581, 595 (1945). Here, the court of appeals affirmed the Board's decision on a second ground addressed by the Board after disagreeing with the Board on the first. There is nothing in the least remarkable about such a disposition. In other cases, courts of appeals—including the court in the case upon which petitioner predicates his claimed conflict (Pet. 12)—have *reversed* the Board's decision outright and declined to remand to the Board if, after concluding the Board's decision could not stand on the basis of its stated rationale, the court determined that "reconsideration by the agency would clearly be an empty

exercise." *Gebremichael*, 10 F.3d at 36 n.22 (citing additional cases). Indeed, in *Fergiste* v. *INS*, 138 F.3d 14 (1998) (cited at Pet. 13), the First Circuit independently determined "as a matter of law that * * * the INS did not rebut the presumption of future persecution," rather than remand for a determination by the Board in the first instance. *Id.* at 19.

The divergent outcomes that petitioner perceives thus do not reflect substantive inter-circuit disagreement on the law, but rather variations in outcome that can be expected to occur in both circuits when a general rule and an exception that turns upon the state of the record are applied to the specific facts of individual cases. The INS does not always agree with court decisions determining that remand is unnecessary and, in fact, believes that remand should be ordered in virtually all cases where the court of appeals sets aside a Board decision because of legal error, so that the Board can reconsider the case with the legal error corrected. Compare, *e.g.*, *FCC* v. *Pottsville Broadcasting Co.*, 309 U.S. 134, 145 (1940). It would never be appropriate, in our view, for a court of appeals to find, in the first instance, that the presumption of future persecution has *not* been rebutted in a case in which the Board had decided the case without reaching that question and, perhaps, without developing a full record on that issue. That is because the INA accords refugee status to an individual only if the "Attorney General determines" that the requisite criteria are satisfied. 8 U.S.C. 1158(a).

In any event, petitioner's mere disagreement with the court of appeals' particularized, fact-bound resolution of his case does not warrant an exercise of this Court's certiorari jurisdiction.

2. Petitioner also argues (Pet. 14-16) that review is warranted because the court erred in affirming the Board on a ground that the agency did not invoke, rather than remanding. That claim is without merit. First, petitioner is ill-positioned to complain about the absence of a remand because he specifically argued to the court of appeals that a remand for the Board to decide whether the INS had rebutted the presumption of a well-founded fear of persecution would be inappropriate in this case. See Pet. C.A. Opening Br. 25 ("We do not believe that remand is appropriate in this case, because '[a] remand at this stage would permit the INS to argue its case . . . a second time.'").[5]

Second, it is highly doubtful that any such error occurred in this case. The Board explained that the immigration judge found no prior persecution (Pet. App. 17), and that the immigration judge found in the "alternative" (*ibid.*) that, even if prior persecution occurred, no well-founded fear of persecution existed due to changed country conditions (*id.* at 13-14). The Board agreed with the latter finding (as well as the finding that no persecution occurred in the first instance). *Id.* at 18. The government's brief to the court of appeals likewise read the Board's decision as determining that there had been an adequate rebuttal of any presumption that would have arisen from a finding of past persecution. See Gov't C.A. Br. 22. Thus, although not couched in terms of rebuttal analysis, the

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[5] Although petitioner now claims (Pet. 14) that the exception to the general practice of remanding that he so strongly advocated before the court of appeals is now "entirely inapposite," he fails to explain why this Court's certiorari jurisdiction should be exercised to review the court of appeals' decision to do precisely what petitioner asked it to do.

Board's decision, when read in light of the structure and wording of the immigration judge's decision that it unqualifiedly affirmed, can reasonably be read as holding that the preponderance of the evidence weighs against a finding of well-founded fear of persecution, and thus that the presumption would be rebutted. Cf. *In re H-*, Interim Dec. No. 3276 (BIA May 30, 1996), slip op. 16, *available in* 1996 WL 291910, at *20 (INS may rebut the regulatory presumption of a well-founded fear of persecution either by introducing additional evidence or by "resting upon evidence already in the record").

Third, even if the court of appeals erred in failing to remand for the Board to apply the rebuttal analysis in the first instance, the court did not usurp the Board's authority to find facts on changed country conditions because the Board expressly found those necessary facts. The court of appeals merely repeated and sustained the Board's findings as to those facts. In short, (i) the close congruity of the court's and Board's reading of the record; (ii) petitioner's failure to challenge before this Court either the Board's or the court's substantive finding of no well-founded fear; and (iii) the fact that petitioner does not argue here and did not argue in any of his filings with the court of appeals that remand is necessary for him to supplement the record before the Board, together render any procedural error by the court of appeals of insubstantial import in the circumstances of this case alone.

There is, in short, no reasonable basis for believing that a remand to the Board for further consideration of the prospect of future persecution would change the ultimate decision. Review of the unpublished decision below therefore is not warranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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